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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ISRAEL FLORES,

Defendant and Appellant.

D051566

(Super. Ct. No. SCD187041)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

A jury convicted Israel Flores of first degree murder (Pen. Code,¹ §§ 187, subd. (a)) and found the allegations of personal use of a firearm (§ 12022.53, subds. (d) & (e)(1)) and that the crime was committed for the benefit of a gang (§ 186.22, subd. (b)(1)), to be true. Flores was sentenced to an indeterminate term of 50 years to life.

¹ All further statutory references are to the Penal Code unless otherwise specified.

The crime in this case arose from a gang-related shooting in which the victim was shot five times while standing outside a house where a party was in progress. Flores was in a car with three fellow gang members when he shot the victim. Although the conviction followed a lengthy trial in which numerous issues were raised, Flores raises only a single legal issue on appeal. Flores contends the trial court erred by instructing the jury on two theories of first degree murder: premeditation and deliberation as well as liability based on an uncharged conspiracy to commit murder. We will reject the challenge to the trial court's instructions and affirm.²

DISCUSSION

As we have indicated, the trial court instructed the jury on two theories of liability for first degree murder. Flores does not challenge the instruction on premeditation and deliberation. He argues, however, that the instruction which would allow a first degree murder conviction based on a conspiracy to commit murder theory is legally improper. Relying on *People v. Guiton* (1993) 4 Cal.4th 1116, 1122, 1128-1129, Flores argues that the jury was instructed with two theories of liability, one of which is legally incorrect and thus the conviction must be set aside because we cannot be assured the jurors relied on the proper legal theory for their verdict. While *Guiton* does require reversal where one of the theories given to the jury is in error, *Guiton* does not apply here because a killing

² Since this appeal does not involve any factual issues and does not challenge either the admissibility or sufficiency of the evidence to support the judgment we find it unnecessary to set forth a statement of facts.

arising out of a conspiracy to commit murder is first degree murder. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1226, 1237-1238 (*Cortez*)).

Section 189 defines a range of unlawful killings that are first degree murders. That section provides, in part: "All murder which is perpetrated by means of . . . any other kind of willful, deliberate and premeditated killing . . . is murder of the first degree. [¶] . . . [¶] To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant, maturely and meaningfully reflected upon the gravity of his or her act."

In *Cortez, supra*, 18 Cal.4th 1223, our Supreme Court had to determine if a conspiracy to commit murder was subject to a finding of less than first degree. The court found it was not. The court said, in part:

"As noted, conspiracy is a specific intent crime requiring both an intent to agree or conspire and a further intent to commit the target crime or object of the conspiracy. [Citation.] Murder that is premeditated and deliberated is murder of the first degree. "[P]remeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." [Citations.] The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly" [Citations.] [¶] Consequently, it logically follows that where two or more persons conspire to commit murder-i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder-each has acted with a state of mind 'functionally indistinguishable from the mental state of premeditating the target offense of murder.' [Citation.] The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder-hence all murder

conspiracies are conspiracies to commit first degree murder, so to speak. More accurately stated, conspiracy to commit murder is a unitary offense punishable in every instance in the same manner as is first degree murder under the provisions of Penal Code section 182. [Citation.]" (*Id.* at p. 1232, fn. omitted.)

The court in *Cortez* analyzed the mental state for deliberate and premeditated murder, taking into account the amendment to section 189 to eliminate the need to show "mature meaningful reflection" that had been engrafted onto the definition by earlier case law. The court concluded the dual specific intents required for conspiracy, i.e., the intent to agree and the intent to kill, made the mental state for conspiracy to murder identical to premeditation and deliberation as used in section 189. "We therefore conclude all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberate first degree murder." (*Cortez, supra*, 18 Cal.4th at p. 1237.)

Although Flores recognizes the analysis in *Cortez, supra*, 18 Cal.4th 1223, he contends the decision is not controlling. Noting that court opinions are not authority for a proposition not considered in the opinion, (*People v. Donaldson* (1995) 36 Cal.App.4th 532, 538), Flores argues that *Cortez* does not authorize a conviction of first degree murder on a conspiracy theory. The argument advanced by Flores is based on his contention that section 189 defines first degree murder and allowing a conviction based on a conspiracy theory would permit a conviction that is not authorized by statute. Flores contends the absence of conspiracy in the statutory definition of first degree murder prevents the court from allowing a conviction based on such theory. In our view Flores misreads section 189 and the import of the *Cortez* reasoning.

Section 189 declares all murder perpetrated by means of "any other kind of willful, deliberate and premeditated killing" is first degree murder. The significance of *Cortez, supra*, 18 Cal.4th 1223, in light of the statute, is to make clear that people who agree to conspire with the specific intent to kill a person have premeditated and deliberated on such killing as that mental state is set forth in the statute. Thus, an intentional killing arising from a conspiracy to murder is a willful, deliberate and premeditated murder. *Cortez* did not add a new definition of first degree murder to section 189. Rather the decision in *Cortez* determined that the mental state for conspiracy to murder was identical to deliberate and premeditated murder. Accordingly, the trial court was correct in advising the jury it could consider conspiracy to murder as a lawful basis for a finding of first degree murder.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.